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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY AS TRUSTEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court's memorandum opinion (R. 27–31) is not reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a–29a) is reported at 227 F. 2d 359.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1955. (Appendix A, *infra*, p. 30a.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether liens for unpaid federal taxes accorded the United States by Sections 3670–3672 of the Internal Revenue Code of 1939 are superior to an inchoate mechanic's lien created by state law, the federal liens having arisen and been recorded before the mechanic's lien was reduced to judgment.

STATUTES AND RULE INVOLVED

Sections 3670, 3671, 3672, 3678, 3679, 3690, 3692, and 3700 of the Internal Revenue Code of 1939, Rule 4 (d) (4) of the Federal Rules of Civil Procedure, Sections 74.01, 74.07, 74.09, 74.11, 74.13, 74.14, 74.15, 74.16, and 74.19 of the Illinois Mechanics' Lien Act are printed in pertinent part in Appendix B, *infra*, pp. 31a–40a.

STATEMENT

This action was brought by the United States in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to Section 3678 of the Internal Revenue Code of 1939, to foreclose liens for unpaid taxes assessed against the McAvoy Brewing Company, Inc. (herein sometimes referred to as the taxpayer). The White Bear Brewing Company, Inc., and the Chicago Title and Trust Company were made parties defendant as transferees from taxpayer of real estate subject to the federal tax liens (R. 7–11). The defendant White Bear moved to dis-

miss the complaint (R. 18–19), and the District Court found the facts to be as alleged in the complaint and the Government's brief (R. 26–28). These undisputed facts may be summarized as follows:

The Commissioner of Internal Revenue assessed income, withholding, and employment taxes against the taxpayer for the years 1947 and 1948, in amounts totaling approximately $25,000. The assessment lists for these taxes were received by the Collector on various dates between November 17, 1947, and December 22, 1948. The United States demanded payment of the taxes, but payment was not made. Notices of liens for the taxes were filed on various dates between December 16, 1948, and April 28, 1949. (R. 7–12, 26–28.)[1]

On May 19, 1947, one Deutsch completed work on the taxpayer's real estate, pursuant to a contract entered into on February 14, 1946. On September 2, 1947, he filed a notice of a "Claim for Lien" under the Illinois Mechanics' Lien Act, in the amount of $8,286. On November 13,

[1] As the court below notes (App. A, *infra*, p. 6a), notices of the federal liens for over $16,000 were recorded on dates before April 28, 1949, the date the mechanic's lienor recovered his judgment. (R. 7–9, 12.) Since these earlier recorded liens were held to be primed by the mechanic's lien, and since they exceeded the amount of the sale proceeds the mechanic's lienor recovered, it is unnecessary to consider here the additional federal lien of which notice was recorded on April 28, 1949, the date of the mechanic's lienor's judgment. Thus, the issue, as posed below and here, is between a recorded federal tax lien and a mechanic's lien before judgment.

1947. Deutsch brought suit to enforce the lien in the Illinois Circuit Court of Cook County. On April 28, 1949, a judgment was entered in that action in favor of Deutsch in the amount of $10,502.35. On June 28, 1949, the real estate in question was sold to Deutsch at public auction for $11,500, and the sale was approved by the Illinois court. The book value of the property at that time was about $315,000, and its forced sale value was about $75,000. Thereafter, Deutsch transferred the property to others, who in 1952 sold it to White Bear Brewing Company, Inc. (R. 20–23, 26–28.)

The United States thereafter brought this action to foreclose its tax liens (R. 4, 7–11), and the defendant White Bear moved to dismiss the complaint (R. 18–19). The District Court granted the motion to dismiss (R. 27–31), holding that the mechanic's lien "attached and was complete, under Illinois law, at the time it was filed," and that it took precedence over the federal lien (R. 30).

The Court of Appeals affirmed, Judge Lindley dissenting (Appendix A, *infra*, pp. 1a–29a). Reading the federal tax lien statutes and the Illinois statutes creating the mechanic's lien, the majority found the two types of lien indistinguishable, stating that "whatever is said about an Illinois mechanic's lien also fits a federal tax lien" (*id.*, p. 17a), that the federal lien in this case was no more "specific or particular" than

the mechanic's lien (*id.*, p. 20a), and that "these two liens simply had different periods of gestation" (*id.*, p. 23a). In response to the Government's argument that the state-created lien could not displace the federal lien by a doctrine of relation back, the court considered the recent decisions in *United States* v. *Acri*, 348 U. S. 211, *United States* v. *Scovil*, 348 U. S. 218, and *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215, and observed (App. A, *infra*, pp. 21a–22a) that their "reasoning attributes to Congress an intention to deprive State lienholders of priority contrary to the principle, first in time first in right." The court concluded that under the foregoing principle and under *United States* v. *New Britain*, 347 U. S. 81, which the opinion describes (App. A, *infra*, p. 24a) as "still unreversed," the mechanic's lien should prevail over the federal tax lien.

Judge Lindley, dissenting, held that this case is controlled in favor of the federal lien by *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47, by the *Acri*, *Scovil*, and *Liverpool & London* decisions, *supra*, and by *United States* v. *Colotta*, 350 U. S. 808 (App. A, *infra*, pp. 24a–29a).

REASONS FOR GRANTING THE WRIT

Explicitly questioning this Court's reasoning in recent cases which squarely control this one, the decision below departs from the rule laid down in those cases—that the federal tax lien pre-

vails over an adverse lien which, though it may have arisen earlier, has not become specific and perfected, and is therefore still inchoate when the federal lien arises. *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Colotta*, 350 U. S. 808. The departure rests at least in part on what we believe to be a misreading of *United States* v. *New Britain*, 347 U. S. 81, which, as is made clear by the subsequent decisions in the last four of the five cases cited above, merely held that a state-created lien which is specific and perfected may prevail over a federal tax lien arising later. In addition to its inconsistency with this Court's decisions, the decision below conflicts with the recent rulings of the Supreme Court of Washington in *Fleming* v. *Brownfield*, decided November 17, 1955 (1956 C. C. H., par. 9138, reprinted as Appendix C, *infra*, pp. 41a–53a) and the Maryland Court of Appeals in *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613.[2] The recurrent character and continuing

[2] See also *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C. A. 2d); *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555; *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413; *Bankers Title & Abstract Co.* v. *Ferber Co.*, 15 N. J. 433; *United States* v. *Hawkins* (C. A. 9th), decided December 13, 1955 (1956 C. C. H., par. 9143); *In the Matter of Chatsworth Investment* (S. D. Cal.), decided October 28, 1955 (1955 C. C. H., par. 9777).

importance of the problem presented,[3] reflected by the several occasions on which this Court has seen fit to consider it, fully justify review and reversal in this case. The alternative, we submit, would be further inroads on principles recently and clearly announced by this Court and divergencies from state to state and court to court in a matter requiring uniform, equal treatment across the nation. See *United States* v. *Gilbert Associates,* 345 U. S. 361, 364.

In *United States* v. *Security Tr. & Sav. Bk., supra,* this Court made it plain that the effect of an adverse lien in relation to the federal tax lien is always a federal question; that a prior "inchoate" lien under state law cannot take precedence over a subsequent lien of the United States for unpaid taxes; and that the local law lien does not attain the status of a choate or perfected one, so as to defeat a subsequently arising federal tax lien, where it remains "contingent upon taking subsequent steps for enforcing it." 340 U. S. at 51. In holding that tax liens of the United States were superior to a preexisting attachment lien created under California law, the Court

[3] While the federal liens here involved arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939, the Internal Revenue Code of 1954 reenacts these provisions without substantive change. See Sections 6321, 6322, and 6323 of the 1954 Code; H. Rep. No. 1337, 83d Cong., 2d sess., pp. A406–A407; S. Rep. No. 1622, 83d Cong., 2d sess., pp. 575–576.

pointed out that the attaching creditor had acquired only an inchoate lien because (p. 50)—

> The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment * * *. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

The court held further (*ibid.*) that the attachment lien could not be deemed to have become choate as of the date of the attachment by virtue of any "doctrine of relation back" of the subsequently obtained judgment, for to apply such a doctrine would "destroy the realities of the situation."

Reaffirmed a year ago in the *Acri, Liverpool & London,* and *Scovil* cases, and still more recently in *Colotta,* the foregoing principles are plainly applicable here. It is undisputed that the federal liens arose and were recorded prior to the time that the mechanic's lienor obtained a judgment fixing the amount of his claim.[4] And until a

[4] Under Code Section 3671 (Appendix B, *infra*, p. 31a) the federal lien arises when the assessment list is received by the Collector. The assessment lists covering the unpaid taxes here involved were received by the Collector between November 17, 1947, and December 22, 1948, while the judgment in favor of the mechanic's lienor was entered on April 28, 1949. (R. 7–9, 26.) See p. 3 and fn. 1, *supra.*

judgment was obtained, the mechanic's lien was not enforceable in any particular amount. Under the Illinois Mechanics' Lien Act, 13 Jones Illinois Statutes Annotated, Section 74.01 *et seq.* (Appendix B, *infra,* pp. 35a–40a), the mere filing of a mechanic's lien, or of a suit for its enforcement, does not of itself determine the correctness or the amount of the lienor's claim. On the contrary, that statute permits the property owner to interpose any defense to the suit, whether by way of answer, set-off, recoupment or counterclaim. *Id.,* Section 74.13 (*infra,* p. 38a). It also permits any other lien claimant to "contest" the mechanic's lienor's claim, "as well with respect to the amount due as to the right to the benefit of the lien claimed." *Id.,* Section 74.09 (*infra,* p. 37a). Only after the "creditor" has "obtained a decree or judgment" is the court empowered to order a sale of the property against which the lien is asserted. *Id.,* Section 74.14 (*infra,* pp. 38a–39a). Thus, pending the suit to enforce the lien and entry of a judgment in the lienor's favor, neither the validity nor the amount of his claim can be said to have been established. Indeed, as the Court of Appeals observed in this very case (App. A, *infra,* pp. 20a–21a), there was "an unexplained difference" of some $2,000 between the mechanic's lienor's claim and the judgment he ultimately recovered (in this case the judgment was greater; in another it could just as well be smaller or unrecoverable). See the particular reference to this

point in the conflicting decision of the Washington Supreme Court, *Fleming* v. *Brownfield* (App. C, *infra,* at p. 50a). It is clear, in short, that until judgment a mechanic's lien created by Illinois law is no less "inchoate" or "contingent" as against the federal lien than the attachment, garnishment, and mechanics' liens considered in the *Security Trust, Acri, Liverpool, Scovil,* and *Colotta* cases.

Mistakenly invoked by the court below, with what appears to us to be an immaterial observation that it is "still unreversed" (App. A, *infra,* p. 24a), *United States* v. *New Britain* in no way impairs the controlling force of the cases both preceding and following it. While holding that prior state liens may defeat the federal tax lien when they are "perfected in the sense that there is nothing more to be done to have a choate lien" (347 U. S. at 84), the *New Britain* decision itself reaffirmed the rule (p. 86), again restated thereafter in *Acri, Liverpool,* and *Scovil,* that "inchoate" liens which "may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach * * * cannot then be permitted to displace such federal liens." It is this latter rule which applies in the instant case.

If further confirmation were required of the validity of this rule so lately and frequently enforced by this Court, it is supplied by *United*

States v. *Colotta,* 350 U. S. 808. There, this Court granted certiorari and, without further briefs or argument, summarily reversed a state court holding that a mechanic's lien was superior to a subsequently arising federal tax lien. In *Colotta,* at the time the federal lien arose the contract giving rise to the mechanic's lien had already been entered into and the work had already been completed, but steps had not yet been taken to obtain a judgment. While in the instant case a suit had been commenced to enforce the mechanic's lien before the federal lien arose, under the controlling principles the result can be no different. The decisive point remains that the adverse lien had not been perfected—neither its amount nor its validity had been finally established—when the federal lien arose and was recorded.

Ignoring this crucial point, the court below affirmed the District Court's dismissal of the Government's complaint solely on the ground that the mechanic's lien antedated the federal lien.[5] In

[5] The District Court alternatively held (R. 30) that the United States was precluded from bringing this action to enforce its lien, on the theory that it was obliged but failed to intervene in the state court proceeding brought to enforce the mechanic's lien—a theory patently contrary to the Congressional scheme for enforcement of the federal lien. 1939 Code Section 3671 provides that the federal lien shall continue until satisfied or barred by lapse of time; Section 3672 provides that where (as here) the federal lien is recorded it is enforceable even as against a subsequent purchaser; and Sections 3678–3679 provide for its enforcement by separate civil action in a District Court of the United States. See

so doing it failed to give effect to the repeated holdings of this Court that the federal lien must prevail over prior liens which are not choate—specific and perfected.

CONCLUSION

The facts upon which this case turns are undisputed, and the question of law presented has already been authoritatively resolved by this Court. To allow the decision below to stand would accord inchoate liens created by some of the states a preference over the federal tax liens not enjoyed by like liens created by other states, and would encourage further departures from the controlling principles declared by this Court. The petition for a writ of certiorari should be granted, and the decision of the court below reversed.

Respectfully submitted.

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FEBRUARY 1956.

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also Sections 1444 and 2410, 28 U. S. C.; *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311 (C. A. 6th), certiorari denied, 310 U. S. 630. At any rate, the court below considered it "unnecessary to reach" this question (Appendix A, *infra*, p. 24a), and affirmed the District Court solely on the ground that the federal lien was subordinate to the mechanic's lien.